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No. 836

In the Supreme Court of the United States

OCTOBER TERM, 1960

LYMAN MOODY BENNETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is reported at 285 F. 2d 567 (Pet. 29-40).

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1960 (Pet. App. 23), and the order denying rehearing was filed on February 17, 1961 (Pet. App. 25). The petition for a writ of certiorari was filed on March 20, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment is sufficient.

2. Whether remarks made during the closing argument of government counsel constituted prejudicial error.

3. Whether observations made by the trial court during the trial, concerning certain immigration procedures, constituted prejudicial error.

4. Whether error was committed when the trial judge recused himself after verdict and another judge presided over the hearing on the motion for a new trial and then sentenced petitioner.

STATUTES INVOLVED

18 U.S.C. 111:

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.
>
> Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. 1114:

> Whoever kills . . . any immigration officer . . . while engaged in the performance of his official duties, . . . shall be punished as provided under sections 1111 and 1112 of this title.

STATEMENT

Petitioner was indicted and convicted in the District Court for the Western District of Texas on two counts charging forcible assault on two Border Patrol Inspectors engaged in their official duties, in violation of 18 U.S.C. 111. He was sentenced to 18 months' imprisonment on the first count and two years on the second, the sentences to run consecutively but with the sentence on the second count suspended (R. 814, 815).

1. The pertinent facts and circumstances are as follows:

On November 13, 1959, several members of the Border Patrol went to the petitioner's farm to apprehend Mexican aliens who were believed to be illegally in the United States and illegally picking cotton on petitioner's farm.[1] Border Patrolman Mahan, at approximately 9:20 a.m., was driving a Border Patrol truck pulling an empty horse trailer, on the petitioner's property (R. 13-14). Petitioner, who was well acquainted with Mahan, stopped him and demanded to know where the horses were (R. 14). Mahan said that they were looking for "wets",

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[1] Petitioner's farm was located on the border of the United States and Mexico. 8 U.S.C. 1357 provides that: "(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant . . . (3) . . . within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States * * *."

and asked whether petitioner had any. Petitioner, who was carrying a .300 Savage rifle, fired it in the air and said "No".[2] He also stated, according to Mahan's testimony, that "I hope to God you haven't brought any horses down here because I am going to kill them and if you try to stop me you will have to kill me or I will kill you" (R. 14-15). Petitioner then drove off at a high rate of speed; Mahan pursued but could not overtake him in the truck (R. 16).

Petitioner then encountered two Border Patrolmen, McCutchen and Whitman, on horses, wearing cowboy outfits. (It was shown that it was customary for Border Patrolmen to wear such clothes when engaged in alien investigations in the field (R. 60, 64, 110-111, 192, 243-244, 245)). According to the testimony of McCutchen and Whitman, petitioner alighted from his car armed with his rifle. He then told the patrolmen to get the horses out, or he would kill the "works" (R. 67-68, 116). McCutchen warned the petitioner to put the gun down, and drew his pistol. Petitioner, from a distance of eight to ten feet, shot and killed McCutchen's horse from under him (R. 56, 68-69, 116). McCutchen fell to the ground and fired twice at the petitioner from a distance of twelve feet (R. 69). When petitioner turned his rifle in the direction of Whitman, McCutchen rushed the petitioner and struck him on the head two or three times (R. 69-71, 117). Whitman then wrested the rifle from the petitioner (R. 71, 116-117).

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[2] There is some testimony that a rifle shot by petitioner was a signal for alien workers to run across the border into Mexico (R. 302).

McCutchen and Whitman's testimony as to the gunfight was corroborated by Border Patrolman Mahan (R. 17-20, 38, 40, 42, 53, 57) and four aliens (Mora, Medrano, Solis, and Mrs. Arce) who witnessed the event (R. 250-254, 270-275, 292-297, 430-434). Mora and Medrano had been captured by McCutchen and Whitman as illegally present in the United States and were in the custody of the officers when the shooting took place.

2. On February 23, 1960, petitioner filed a motion for a new trial on the ground of newly discovered evidence (R. 575-577). This evidence consisted of the two affidavits (R. 578-582, 583-585) of aliens Solis and Mora, recanting certain portions of the testimony they gave at the trial.[3] The government opposed the motion (on March 28, 1960), on the ground that the affidavits were made only after the inducement of the petitioner "for monetary and other considerations" (R. 586.)[4]

At the hearing on the motion, petitioner presented two witnesses—the interpreter and the notary when the affidavits were taken on February 20, 1960, in a station-wagon near the United States-Mexican border. Both stated that they had no knowledge of

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[3] In the affidavits, both Solis and Mora stated that the officers fired at the petitioner first and that the testimony given at the trial was induced by fear of the immigration officers.

[4] On February 29, 1960, a complaint was sworn out against the petitioner charging him with corruptly endeavoring to influence, intimidate, and impede a witness, namely Carlos Solis, by inducing him to make a false affidavit, in violation of 18 U.S.C. 1503 (R. 591).

the events prior to February 20, leading to the making of the affidavits (R. 634, 645).

Solis and Mora testified that on February 18, 1960, a messenger was sent by the petitioner requesting that the men see him (R. 648-649). Both Solis and Mora were asked to change their testimony and make statements favorable to the petitioner (R. 649-650, 731-732). They were assured that the petitioner and the trial judge were good friends, that they had known each other since childhood, that the judge was only looking for an excuse to throw out the case, and that the judge himself had asked for this new statement (R. 650, 732). Solis and Mora then made the statements as requested, and were each paid $25.00 (R. 651-652, 732). Both men repudiated the statements in the affidavits (R. 656-662, 734-738) and once again testified substantially as they had at the trial (R. 664, 731).

Joacquin Rey testified that he was offered $25.00 to give an affidavit but refused because he "didn't want to give false testimony" (R. 757-758). Antonio Flores testified that petitioner had hired him to act as the messenger to the aliens, and that he was paid $10.00 and groceries for his services (R. 698-706).

The motion for a new trial was denied on June 14, 1960 (R. 812).

ARGUMENT

1. Petitioner argu 1) that the indictment does not state a crime bec se "border patrol inspectors" are not "immigration off s" under 18 U.S.C. 1114, *supra*, p. 2; and (2) t the indictment is de-

fective as a pleading because it does not charge knowledge that the men assaulted were federal officers then in the performance of their duties. The first point was unsuccessfully raised in the motion to dismiss the indictment (R. 3, 5) and in the motion for acquittal (R. 571, 574). The latter point was raised for the first time on appeal to the court of appeals. Neither issue has any merit.

a. The argument that Border Patrol Inspectors are not "immigration officers" within 18 U.S.C. 1114 is answered by 8 U.S.C. 1101(a)(18) which defines the term "immigration officer" as:

> any employee or class of employees of the Service or of the United States designated by the Attorney General, individually or by regulation, to perform the functions of an immigration officer specified by this Act or any section thereof.

That Border Patrol Inspectors fit within this definition clearly appears from the Act of Congress relating to the Border Patrol, approved February 27, 1925, 43 Stat. 1049, as amended on August 7, 1946, 60 Stat. 865. Moreover, under the Immigration and Naturalization Service Regulations, Patrol Inspectors are explicitly defined as "immigration officers". 8 C.F.R. § 103.1(i) (1961 Supp.).

b. As to petitioner's second point, the indictment (R. 1-2), drawn in the language of 18 U.S.C. 111, *supra*, p. 2, was plainly sufficient. *Hall* v. *United States*, 235 F. 2d 248 (C.A. 5); *Garza* v. *United States*, 159 F. 2d 413, 414 (C.A. 5); *Long* v. *United States*, 199 F. 2d 717, 720 (C.A. 4); *United States* v. *Combs*, 73 F. Supp. 813 (E.D.Ky.). The issue of

whether knowledge that the person assaulted was a federal officer is an element of the offense [5] is not present in this case; the trial judge submitted that question to the jury which, in convicting, necessarily found that petitioner had such knowledge. The failure to allege knowledge in the indictment, even if an error, was not one which could be asserted for the first time on appeal. *Hagner* v. *United States*, 285 U.S. 427, 433.

2. Petitioner also asserts that portions of the closing arguments of the government (Pet. App. 41-51) prejudiced him (Pet. 12-14). However, contrary to petitioner's claim, nowhere in the record can there be found a personal statement by the government attorneys as to petitioner's guilt. Statements by government counsel declaring petitioner's guilt were based on the evidence introduced at the trial. This is permissible. *Thompson* v. *United States*, 272 F. 2d 919 (C.A. 5), certiorari denied, 362 U.S. 940; *Henderson* v. *United States*, 218 F. 2d 14, 19 (C.A. 6), certiorari denied, 349 U.S. 920; *Schmidt* v. *United States*, 237 F. 2d 542, 543 (C.A. 8).

Petitioner complains that the government attorneys committed error by personally vouching for the integrity of the testifying officers. The answer is that, throughout the trial and in the closing argument,

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[5] Cf. *McNabb* v. *United States*, 123 F. 2d 848 (C.A. 6), reversed on other grounds, 318 U.S. 332 (relating to the killing of an officer) and *Hanis* v. *United States*, 246 F. 2d 781, 785 (C.A. 8), with earlier decisions of the Fifth Circuit. *Hall* v. *United States*, 235 F. 2d 248 (C.A. 5); *Carter* v. *United States*, 231 F. 2d 232 (C.A. 5), certiorari denied, 351 U.S. 984; see also *Sparks* v. *United States*, 90 F. 2d 61 (C.A. 6).

petitioner's counsel attempted to convey a picture of collusion among government enforcement officers, designed to convict the petitioner unfairly (R. 36-37, 79-80, 88, 94, 99, 106, 127, 188-189, 200, 208-210, 502-503, 508, 518-519, 523-524). This unwarranted attack on the officers moved the government counsel to uphold the officers' integrity. In the circumstances, rebuttal of this type was within the province of permissible argument to the jury. See *United States* v. *Battiato*, 204 F. 2d 717, 719 (C.A. 7); *Lawn* v. *United States*, 355 U.S. 339, 360.

Beyond that, as the court of appeals pointed out (Pet. App. 38), the government was "doing little more than resorting to rhetoric in presenting [its] case to the jury" — — in stressing the necessity of protecting law enforcement officials, the importance of border patrol activities, and the jurors' obligation to do their duty as citizens. See *DiCarlo* v. *United States*, 6 F. 2d 364, 368 (C.A. 2), certiorari denied, 268 U.S. 706. There was no unfairness and nothing to mislead or inflame the jury.

3. Petitioner argues that an explanation, given *sua sponte* by the trial court, of the usual procedures in certain immigration cases constituted reversible error. The circumstances were these: petitioner attacked the credibility of a government witness, who was an alien by attempting to show that the witness was given special favors by the Immigration Service (R. 287). On redirect, when the government started to show the usual policies of the immigration authorities with respect to illegal entrants of this class (R. 288), petitioner objected on the ground of materiality.

Apparently overruling the objection, and probably in an effort to save time, the court explained the usual procedure in that area (R. 288-289). This was not usurpation of the role of counsel. The judge can take judicial notice of the regulations and procedures of federal agencies (*United States* v. *Shapiro*, 159 F. 2d 890, 891 (C.A. 2), affirmed, 335 U.S. 1; *Johnston* v. *United States*, 145 F. 2d 137, 138 (C.A. 9); *United States* v. *Lutz*, 142 F. 2d 985, 989 (C.A. 3)), and can likewise declare the practice of the court itself (as the trial judge did here).

4. Finally, petitioner contends that error was committed when District Judge Thomason, who presided over the trial, permanently recused himself after the verdict against petitioner was rendered. Following petitioner's trial in January 1960, Judge Thomason fell ill with pneumonia. District Judge Ben Rice was scheduled to preside over the hearing on the petitioner's motion and sentencing, under the authority of Rule 25, Federal Rules of Criminal Procedure (providing for a successor judge in case of death, sickness, or other disability). On March 29, 1960, petitioner filed a motion to postpone the hearing until Judge Thomason was able to preside again (R. 588). The government opposed this motion and alleged in part that Judge Thomason was still recuperating and that his name had been used by the petitioner to procure false affidavits from Mexican aliens, recanting their testimony given at the trial[6] (R. 592-594).

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[6] This was later substantiated at the hearing (R. 649-652, 656-662, 732, 734-738). See the Statement, *supra*, p. 6.

As a result, on April 1, 1960, Judge Thomason permanently disqualified himself from further participation in the case (R. 595-596).

On April 4, 1960, the petitioner filed a motion requesting a summary order for new trial because Judge Thomason had recused himself (R. 597-601). This order was properly denied by Judge Rice (R. 602). In *Connelly* v. *United States*, 249 F. 2d 576, 579 (C.A. 8), certiorari denied, 356 U.S. 921, it was held that Rule 25 provides only one prerequisite to action by a successor judge — that the successor judge exercise sound judicial discretion to determine whether he can satisfactorily perform the duties of the judge who presided at the trial. Here, as in the *Connelly* case, the successor judge denied petitioner's motion for a new trial only after "duly studying the testimony of the witnesses at the main trial and having thoroughly read and studied the transcript of the evidence adduced at the trial" (R. 812). In addition, he presided at the hearing on the motion for a new trial, and heard testimony on that motion. There can therefore be no proper challenge to his authority to act.[7]

[7] Neither in the court of appeals nor in his petition in this Court does the petitioner attack Judge Rice's ruling on the merits. His whole argument is posited on the contention that Judge Rice was required summarily to grant a new trial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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